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Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

SHANTEE MAHARAJ, Executrix
THE ESTATE of D. DEV MONGA

Petitioner

v.

JOHN C. OTTENBERG, Individually and as Receiver; BERRY, OTTENBERG & DUNKLESS; THE VANGUARD GROUP, INC.; VANGUARD FIDUCIARY TRUST COMPANY; VANGUARD/MORGAN GROWTH FUND, INC.; PAUL F. SOMMER; PETER S. BROOKS; BROOKS AND LUPAN; FOUNDERS FUNDS, INC.; INVESTORS FIDUCIARY TRUST COMPANY

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Shantee Maharaj, Executrix
The Estate of D. Dev Monga, Pro Se
426 Drummers Lane
Wayne, PA 19087
Tel.: 610-971-0185

January 19, 2003

83 pp

QUESTIONS PRESENTED

1. Whether the scope of *Patterson v. Shumate*, 504 U.S. 753 (1992), (hereinafter "*PATTERSON*"), as construed by most circuit courts, extends protection against creditors' claims to retirement funds held in "IRAs" (Individual Retirement Accounts) based on the nonforfeitable and anti-alienation provisions of 26 U.S.C. 408, State exemption statutes, and IRA Trust Agreements?

2. Whether the Third Circuit's decision giving full faith and credit to a State court's orders/judgment permitting a creditor to seize statutorily protected IRAs conflicts with the Supremacy Clause, as well as with congressional statutes as interpreted by *PATTERSON*, where the State court relies upon general and unsubstantiated allegations of fraud and the alleged violation of an injunction as the basis for issuing said orders/judgment?

3. Whether a court of the United States may give full faith and credit to a State court's orders/judgment permitting a creditor to seize statutorily protected IRAs to satisfy a judgment in a civil action commenced years after the establishment of said IRAs, where the basis for issuing the orders/judgment are general and unsubstantiated allegations of fraud, where said allegations as to the IRAs were never actually litigated, where that State court lacks jurisdiction over the IRAs, and where said orders/judgment are undomesticated?

PARTIES BELOW

Petitioner is Shantee Maharaj, Executrix of The Estate of D. Dev Monga, who is the sole beneficiary and surviving spouse.

Respondents appear in the caption of the case on the cover page as follows:

John C. Ottenberg, Individually and as Receiver;
Berry, Ottenberg & Dunkless;
The Vanguard Group, Inc.;
Vanguard Fiduciary Trust Company;
Vanguard/Morgan Growth Fund, Inc.;
Paul F. Sommer (non-appearing);
Peter S. Brooks (non-appearing);
Brooks And Lupan (non-appearing);
Founders Funds, Inc.;
Investors Fiduciary Trust Company

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The court of appeals' judgment and opinion are not reported, but are reproduced in the Appendix. (App., *infra*, A1-A2, A3-A11.) The court of appeals' opinion denying the Petition For Rehearing is not reported, but is reproduced in the Appendix (App., *infra*, B12.) The district court's opinions are not reported, but are reproduced in the Appendix. (App., *infra*, C13-C17, D18-D25.)

JURISDICTION

The court of appeals' judgment and opinion were entered on July 30, 2002. (App., *infra*, A1-A2, A3-A11.) On August 22, 2002, a single panel member denied Petitioner's "Petition For Rehearing By The Panel And Suggestion For Rehearing En Banc." (App., *infra*, B12.) Petitioner's Application No. 02A392, seeking an extension of time, was granted on November 20, 2002, allowing the instant Petition For A Writ Of Certiorari to be filed on January 19, 2003.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1254 (1). Petitioner also invokes this Court's general superintendence jurisdiction over proceedings in lower federal courts. See e.g., *U.S. v. Munsingwear*, 340 U.S. 36, 40 (1950); *Frazier v. Heebe*, 482 U.S. 641, 646, n. 3 and 4 (1987); 28 U.S.C. 2072.

CONSTITUTIONAL PROVISION INVOLVED

Article VI, Paragraph 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

> bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

STATUTORY PROVISIONS INVOLVED

Section 408 of the Internal Revenue Code, (26 U.S.C. 408) provides in relevant part:

> For purposes of this section, the term "individual retirement account" means a Trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, . . .
> The trustee . . . will administer the trust . . . consistent with the requirements of this section.
>
> The interest of an individual in the balance in his account is nonforfeitable.

Pennsylvania statute, 42 Pa. C.S.A. Section 8124 (b) (1) provides in relevant part:

> the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment:
>
> Any retirement or annuity fund provided for under ...section 408...of the Internal Revenue Code.

Missouri statute, Mo. Ann. Stat. Section 513.430 (10) (f) provides in relevant part:

> [t]he following property shall be exempt from attachment and execution to the extent of any person's interest therein:
>
> > any interest of any participant or beneficiary in a retirement plan which is qualified under section...408...of the Internal Revenue Code

Massachusetts statute, M.G.L. Ch. 235, Section 34A provides in relevant part:

> The right or interest of any person in ... an Individual Retirement Account ... shall not be attached or taken on execution or other process to satisfy any debt or liability of such person

28 U.S.C. 1738 provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT

Introduction: These questions of federal law are of significant and immediate national concern, potentially affecting an estimated 44.3 million American households holding $2.41 trillion in IRAs, mostly invested in mutual funds. See *www.ici.org*, the Investment Company Institute's website. As Americans change jobs, retirement funds are often rolled over into IRAs with mutual fund companies in more than one jurisdiction. Petitioner's IRAs were just such retirement funds. IRAs were established by 26 U.S.C. 408 as tax-favored retirement savings vehicles. Forty-five States either have exemption statutes incorporating 26 U.S.C. 408 protecting IRAs, or courts in those States have interpreted exemption statutes to exclude IRAs from creditors' claims.

In *PATTERSON, supra*, this Court held that ERISA (Employee Retirement Income Security Act) pension funds are beyond the reach of creditors' claims, but left undecided the parallel issue of funds held in IRAs. The question is whether IRAs should be similarly protected. Circuit courts

have followed *PATTERSON* giving IRAs ERISA-like protections from creditors' claims. In the instant action, the court of appeals deviated from *PATTERSON* and six circuits, thereby creating a conflict among the circuits, introducing ambiguity in the law concerning IRAs, and opening the floodgates to imaginative procedures designed to strip IRAs of their protected status.

Background: Petitioner was the sole account-holder of an IRA established since 1983 with Scudder Funds, Inc., in Massachusetts. The IRA contained only retirement funds distributed to Petitioner from his former employer's pension plan. The last such deposit to the IRA was made in January 1986. The IRA assets were invested in mutual funds.

To secure the best returns, in 1991, these funds were rolled over with The Vanguard Group, Inc., of Pennsylvania ("Vanguard"), and with Founders Funds, Inc., of Colorado ("Founders"). [1] When Vanguard and Founders opened the two rollover IRA accounts, they confirmed that Petitioner's IRA funds were valid, and complied with 26 U.S.C. 408.

In 1989, six years after Petitioner's IRAs were established, his former business associate filed a Massachusetts breach of contract lawsuit against Petitioner and his two companies, involving purchase of shares in the companies. The IRAs were not at issue in the lawsuit.

In 1991, eight years after Petitioner's IRAs were established, judgment of $437,594 and an injunctive order were entered against Petitioner and his companies in the lawsuit. The injunction allowed Petitioner to transfer any

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[1] The Respondent Investors Fiduciary Trust Company is Founders' agent who held Petitioner's Founders IRA assets in Missouri. The term "Founders" is collectively used to include its agent.

property in the ordinary course of business. App., *infra*, E26-E28.

During pre and post judgment discovery, the creditor had confirmed from extensive financial records produced by Petitioner that the IRAs were valid, and that no monies were ever taken from or added to the IRAs before or after the initiation of the lawsuit, the judgment or the injunction.

Neither the State where the judgment was issued (Massachusetts), nor the States where the IRAs were located (Pennsylvania and Missouri) allow seizure of IRAs to satisfy a judgment. See M.G.L. Ch. 235, § 34A; 42 Pa. C.S.A. § 8124 (b) (1); Mo. Ann. Stat. § 513.430 (10) (f).

The questions presented arise from circumstances where, in violation of the above-referenced statutes, and their own IRA Trust Agreements, and with no evidence of impropriety, Vanguard and Founders attached Petitioner's statutorily protected IRAs in June 1992. They aided an out-of-state Receiver acting without legal authority, on behalf of the judgment creditor, to seize Petitioner's IRAs to satisfy the judgment. Vanguard and Founders soon realized they made serious legal blunders, and conspired with the Receiver to cover up the matter and shield their misdeeds from scrutiny. Together, they manipulated the judicial process to silence the victim's pleas, to enrich the Receiver and themselves, and to avert the possible tarnishing of their reputation as trustworthy guardians of retirement savings. Ultimately, Vanguard, Founders and the Receiver laid claim to and were paid all the proceeds of Petitioner's IRAs in the sum of $172,000 for their wrongful conduct. Petitioner's widow got nothing. [2] This is all documented as follows:

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[2] This was not the first time Vanguard made such a serious mistake. Vanguard was found liable for violating pension laws and its fiduciary duties in suit concerning $341,893 of another person's retirement funds. That court held: "Simply stated, a

Creditor manipulated the law: Unable to reach Petitioner's IRAs because of the above-referenced statutes, the creditor engaged in "strategic manipulation" of the law (within the meaning of *PATTERSON*) to have a Receiver seize and execute upon Petitioner's assets. Petitioner had appealed the judgment on July 11, 1991, and obtained an automatic **Stay of Proceedings to Enforce a Judgment and Stay of Execution** pursuant to M.R.Civ.P. Rule 62. Massachusetts law prohibits seizure and execution of assets pending appeal. The creditor was concerned that Petitioner would prevail on appeal and sought to execute on the judgment before Petitioner's appeal was briefed. Knowing that Petitioner was then representing himself and was out of the State on an extended business trip, on June 10, 1992, (nine years after the IRAs were established), the creditor filed an ***ex-parte*** motion to appoint a Receiver to seize and liquidate the assets belonging to Petitioner, his companies, and his wife, which were far greater than the judgment. [3]

In an ***ex-parte*** hearing, the creditor falsely asserted that Petitioner had engaged in fraudulent conveyance to avoid satisfaction of the judgment, and had violated an injunction which "prohibited transfer of assets away from the jurisdiction." The creditor omitted key portions of the injunction which **allowed** transfer of any property in the ordinary course of business. App., *infra*, E26-E28. The Massachusetts State court accepted the creditor's allegations at face value, and made no factual determination. On June

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trustee does not act in good faith when it follows a fraudulent instruction that requires it to violate both its own trust agreement and the law." See *Donald R. Buse v. The Vanguard Group of Investment Companies, The Vanguard Group, Inc., and Vanguard Fiduciary Trust Company*, Action 91-3560 (E.D. Pa.), 1994 U.S. Dist. Lexis 3978; 1996 U.S. Dist. Lexis 19033; 1998 U.S Dist. Lexis 1242.

[3] Petitioner's wife was not a party to the lawsuit, and was never served process.

15, 1992, the creditor obtained a highly irregular ***ex-parte*** order appointing his personal nominee as Receiver. The Receiver was appointed during a *Statutory Stay of Proceedings to Enforce a Judgment and Stay of Execution;* was not selected at random from the court's list but was specifically chosen by the creditor; was not required to pay the usual bond which would have been equal to the judgment, and was also appointed over a non-party. App., *infra,* F29-F33.

The Receiver immediately directed the creditor and the creditor's lawyers Peter and Cathy Brooks and Walter Lupan to raid Petitioner's offices in his absence. On June 16, 1992, unannounced, the creditor and his three lawyers forced their way into the offices, seized files, confidential business and financial records, trade secrets, clients lists, privileged legal documents and tax records, and downloaded computer information which they placed in their automobiles and fled. While this was taking place, the Receiver forced entry into Petitioner's home, again, in Petitioner's absence, raided his home, confiscated property, changed the locks, and denied Petitioner all access. The Receiver then sold Petitioner's household of furnishings and personal property (including property exempt by law), and thereafter, approved the sale of Petitioner's marital home.

Before Petitioner's appellate brief could be filed, the Receiver had looted Petitioner's estate, liquidated Petitioner's businesses, seized all bank accounts and mail, and handed over all business information, records, business equipment, and client lists to the creditor for use in his competing business. Petitioner was deprived of all funds and was financially crippled, which put him out of business. The bulk of the creditor's and the Receiver's proceedings were ***ex-parte***, and Petitioner was never afforded a full and fair opportunity to participate through normal adjudicative procedures and to actually litigate or defend himself on the merits. Within weeks, Petitioner had no job, no business, no home, and no assets left other than his IRAs.

Trustees attached IRAs based on unproven allegations of fraudulent conveyance: Although the receivership order made no mention of the IRAs, the Receiver telephoned Vanguard and Founders, asserted he was a "court-appointed Receiver," and without any evidence, alleged that the IRAs were fraudulent, demanded the IRAs be changed to his name, that Petitioner not have access to them, and that the funds be sent to the Receiver in Massachusetts. The Receiver ignored statutorily prescribed procedures to enforce the Massachusetts receivership order, and threatened contempt action if Vanguard and Founders did not comply with his extraterritorial demands. [4]

Vanguard and Founders protected their interest to Petitioner's detriment. Without notice to Petitioner, and **without an operative court order** of jurisdiction over the IRAs and the Trustees, they attached the IRAs, changed the name and address to the Receiver's, and began mailing all IRA statements to the Receiver. [5] The Receiver did not

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[4] Vanguard and Founders were **non-parties** to the lawsuit. To enforce the Massachusetts order, the Receiver was required to "domesticate" it by first obtaining a final Massachusetts judgment, and then bringing an action in Pennsylvania and Missouri requesting a court with jurisdiction over the IRAs to execute on the judgment. This was never done. See e.g., 42 Pa. C.S.A. § 4306 *et seq.* ("Enforcement of Foreign Judgments.") See also, 42. Pa.C.S.A. § 8128 (enforcement of claims against Pennsylvania residents in foreign jurisdictions prohibited.)

[5] The Receiver had also made similar threats and demands to another financial institution, T. Rowe Price in Maryland. However, T. Rowe Price rejected the Receiver's claims, and protected that IRA, arguing that IRAs are nonforfeitable under 26 U.S.C. 408; that IRAs are protected from creditors' claims by IRA Agreements and Maryland statute; that the Massachusetts order was not recognizable in Maryland, and that Massachusetts courts had no jurisdiction over the IRA or Trustees. The Receiver did not contest this.

establish any basis to seize the IRAs, alleging only that the amount in the IRAs was "high for someone of Mr. Monga's age." [6] (Receiver's Substitute Complaint, Count XI, Docket No. 295, Middlesex Superior Court, MA. C.A. 89-2851.)

The Receiver finessed the legitimacy of the IRAs by referring to them as "so-called IRAs." On July 7, 1992, he obtained an ***ex-parte*** order directed at the **non-party** Vanguard to turn over the IRA funds to him. App., *infra*, G-34. The Receiver produced no evidence that the rollovers were prohibited, or that the IRAs were used to hide assets–an inference he had the court draw from the mere fact that the IRAs were rolled over. (IRAs were then still a novel retirement investment vehicle.) On August 20, 1992, the Receiver obtained another ***ex-parte*** order directed at the **non-party** Founders and its agent to turn over the IRA assets to him. App., *infra*, H35-H36. [7]

Petitioner informed Vanguard, Founders and the Receiver that his IRAs were valid, and repeatedly requested that they properly follow court procedures and the Rules. Petitioner also notified Vanguard, Founders and the Receiver that he neither engaged in any strategy to frustrate satisfaction of the judgment, nor disobeyed any court orders regarding any of his assets or the IRAs. On the contrary, all of Petitioner's actions were taken in good faith on the advice of counsel that the ***ex-parte*** orders calling for attachment of statutorily protected retirement funds were unenforceable because they were undomesticated, jurisdictionally defective, and concerned property exempt from creditors' claims, and under M.G.L.C. 235, § 16, no execution shall

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[6] Petitioner was then 52 years old.

[7] As a routine, the creditor and the Receiver litigated by ex-parte proceedings. These are only a few of their 70 ***ex-parte*** proceedings in the Massachusetts lawsuit.

issue until the exhaustion of all appellate review. Petitioner maintained that the IRAs were valid and exempt from attachment and seizure, and presented that position to the Receiver, the IRA Trustees, as well as to the courts. In short, Petitioner neither hindered nor delayed the judicial process, nor created any hurdles or unnecessary expenses.

Recognizing their grave error in acceding to the Receiver's demands, Vanguard attempted to distance themselves from their initial actions. They continued to attach, but did not turn over the IRAs, arguing to the Receiver that the Massachusetts order was jurisdictionally void and contrary to Pennsylvania laws. For example, on October 5, 1992, Vanguard wrote to the Receiver *"it will be necessary for you to obtain an order from a Pennsylvania court of appropriate jurisdiction before we comply with your request to transfer the Monga IRA . . . Article 8.4 of the Agreement provides that the Monga IRA shall be governed by Pennsylvania law . . . As you know, Pennsylvania law generally prohibits attachment of IRA assets."* Still, **without any legal authority**, Vanguard and Founders refused to remove the attachment, and continued to hold the IRAs "hostage" for several years.

Petitioner files action: After numerous unsuccessful attempts through counsel to obtain Vanguard and Founders' compliance with their IRA Agreements and the laws protecting IRAs, in August 1995, Petitioner, a Pennsylvania resident, commenced the instant suit in a Pennsylvania federal court. Petitioner sought damages against Vanguard, Founders, the Receiver and his firm, the creditor, and the creditor's lawyers for unfair debt collection under 15 U.S. C. 1692; civil rights violations under 42 U.S.C. 1983 for deprivation of property interests in retirement funds; breach of fiduciary duty; breach of contract; tortious interference with contractual relations; wrongful attachment; and conversion. Petitioner also sought declaratory judgments that his IRAs comply with the Internal Revenue Code and State exemption statutes, and are not subject to the creditors'

claims, and that the receivership order is void, and is not entitled to recognition. Amended Verified Complaint, dated Nov. 29, 1995, Docket No. 3, C.A. 95-5235 (E.D. Pa.).

Vanguard and Founders attempted to avoid scrutiny of their wrongful conduct, and threatened Petitioner that they would deplete the IRAs as "legal fees" if he pursued legal recourse. To protect the IRAs and relieve Vanguard and Founders of any expenses, Petitioner sought to have the Pennsylvania Court of Common Pleas, Montgomery County, take custody of the IRAs (Civ. Action 95-17717). [8] On September 22, 1995, that court ordered Vanguard and Founders to place the IRAs in the court's custody, but inexplicably, they disobeyed. App., *infra*, I 37-I 39.

Petitioner died of cancer in August 1996--without the use of his IRAs when they were most needed. Vanguard and Founders were now obligated to pay the IRA assets to Petitioner's widow as the IRAs passed directly to the surviving spouse as sole beneficiary. Such a distribution comports with the Internal Revenue Code, the IRA Trust Agreements, IRS Regulations, and State exemption statutes which protect IRAs from creditors. Again, Vanguard and Founders refused to comply with the law.

Respondents circumvented federal and Pennsylvania laws: While Petitioner's case was pending in Pennsylvania, Vanguard and Founders collaborated with the Massachusetts Receiver to execute upon the IRAs, and to share the IRA assets then worth $172,000. They engaged in procedural maneuvers to strip Petitioner's widow of the IRAs, and to lay a fictitious groundwork to preclude the instant action. Even though the IRAs and Trustees were located in Pennsylvania and Missouri (with no offices in

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[8] Petitioner's instant Complaint was being amended and service of process had not yet been effectuated upon the parties.

Massachusetts), and the instant issues in Petitioner's Pennsylvania action were not before the Massachusetts court, Vanguard and Founders appeared in the Receiver's collection action and falsely asserted that the Pennsylvania federal court had stayed the proceedings so Massachusetts could resolve the matter. Without any basis, they asked the Massachusetts court to allow them to keep $92,000 from the IRAs as "legal fees," and to enjoin Petitioner's widow from prosecuting any action against them.

No factual findings of fraud, and no full and fair opportunity to litigate in Massachusetts: By special appearance, Petitioner's widow opposed the transfer of the IRAs on the grounds that, *inter alia*, the IRAs were nonforfeitable under 26 U.S.C. 408, that the IRAs were exempt from attachment and execution by State statutes and the IRA Trust Agreements, that the IRAs were legitimate retirement assets, that the Receiver failed to provide any basis for his claim that the IRAs were invalid, and that Massachusetts had no jurisdiction over the IRAs or the issues in Petitioner's action. Petitioner's opposition was supported by affidavits and financial records showing that all of the funds in the Vanguard and Founders IRAs originated from Petitioner's former employer's pension plan and complied with 26 U.S.C. 408. Docket Entries 405 - 410, Middlesex Superior Court, MA. Civil Action No. 89-2851.

The Massachusetts court refused to consider Petitioner's documentary evidence as to the legitimacy of the IRAs, or to make any factual findings, or to actually litigate the issue of the validity of the IRAs. It also refused to recognize the federal and State statutes protecting IRAs and the IRAs' exempt status, and further refused to litigate the issue of the alleged violation of a court order.

The Massachusetts court granted Vanguard and Founders $92,000, as well as their requests to enjoin Petitioner's widow from prosecuting any action against

them. It also ordered the remaining $80,000 paid to the Receiver, and in August 2000, entered summary judgment in the Receiver's favor. The widow received nothing.

The Receiver's complaint failed to meet the minimum threshold required to sustain recovery for fraudulent conveyance as to statutorily protected IRAs. The Receiver produced no evidence of fraud, money laundering, or illegality as to the IRAs, or that any non-exempt assets were placed in the IRAs. The IRAs were not shown to be fraudulent in any manner, yet the Massachusetts court allowed the seizure, and refused Petitioner any opportunity to litigate the sufficiency of the Receiver's allegations. Petitioner's IRAs were seized based on vague and unsupported allegations of fraudulent conveyance and violation of a court order.

The Massachusetts State court concluded that an *alleged* violation of an order is sufficient grounds to strip a citizen of his statutorily protected IRAs, and stripped Petitioner of his exempt IRAs. [9] The court simply asserted that the widow ***"had no present interest in the accounts,"*** and thus the court had ***"no occasion to consider which of the various statutory exemptions...would apply, and what proportion of the assets would be exempt."*** App., *infra*, A-6.

Vanguard and Founders misled Pennsylvania federal court: Although the issues in Petitioner's instant *in rem* action for *damages/declaratory relief* remained to be litigated, and were outside the scope of the Receiver's *in personam collection* action, in August and September 2000, Vanguard and Founders each moved to dismiss the instant action, misrepresenting to the Pennsylvania federal court that the Massachusetts court resolved the instant issues. Docket Nos. 70 and 72, (95-5235 (E.D. Pa.)).

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[9] Petitioner denies any violation of any court orders, and has addressed said issue in Section C, *infra*, in this Petition.

Also, despite the fact that Vanguard and Founders had ignored the Receiver's 1992, *ex-parte* Massachusetts orders to turnover the funds to him (App., *infra, G34, H35-H36*), considering the orders jurisdictionally void and in violation of State exemption statutes, and their IRA Agreements, Vanguard and Founders changed their position and falsely stated to the Pennsylvania court that they had obeyed those orders with regards to their conduct concerning the IRAs.

In another exercise in strategic manipulation, Vanguard and Founders tampered with the Massachusetts court transcript making it appear that Petitioner's widow stated that the instant action was voluntarily dismissed. See footnote 1, App., *infra,* A6. Their motions to dismiss failed to cite any authority, and their arguments to both the Massachusetts and the Pennsylvania courts contained material misrepresentations, and were inconsistent and irreconcilable. Docket Nos. 70 and 72, (95-5235 (E.D. Pa.)).

These factors had such prejudicial effects that on October 24, 2000, the district court prematurely dismissed the instant case before Petitioner's time to respond had expired. Docket No. 77, (95-5235 (E.D. Pa.)). Petitioner's motion to vacate was granted, and an opposition was filed, supported by memorandum, affidavits and financial documents detailing the history of the IRAs. Consistent with the relief sought in the Complaint, Petitioner urged the district court to make a determination as to the validity of the IRAs and their exempt status, arguing *inter alia*, the insufficiency of the Receiver's allegations, that Massachusetts lacked jurisdiction over the IRAs, that the instant issues were not actually litigated in Massachusetts, and that the undomesticated Massachusetts orders and judgment were unrecognizable in Pennsylvania. Docket Nos. 85, 86, 87, 90, (95-5235 (E.D. Pa.)).

Without addressing the issues in Petitioner's Complaint, or reviewing the validity of the Massachusetts orders/judgment, on March 1, 2001, the district court dismissed the instant action with prejudice for failure to state a claim. App., *infra*, C13-C17. The Pennsylvania district court relied on Vanguard and Founders' misrepresentations, and the Massachusetts' order enjoining Petitioner's widow from prosecuting any action against Vanguard and Founders although this Court has ruled that a State court cannot enjoin a federal suit. *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

The court of appeals failed to address the district court's errors raised by Petitioner and also ignored documentary evidence as to the validity of the IRAs. The record showed that the Massachusetts court denied Petitioner the opportunity to actually litigate the sufficiency of the Receiver's allegations of fraud as to the IRAs, and the supposed violation of an injunctive order, as well as the issue of the IRAs' exempt status. Yet, the Third Circuit erroneously focused on the judgment against Petitioner, and the Massachusetts court's conclusions that Petitioner forfeited the right to his protected IRAs. App., *infra*, A4, A-6, A-10, A-11. In July 2002, the court of appeals upheld dismissal by invoking the doctrine of issue preclusion based on the Massachusetts judgment--which doctrine was **not** argued by Vanguard and Founders in the district court. [10]

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[10] Vanguard's pattern of asserting preclusion to avoid a trial on the merits is confirmed by the *Buse* case, *supra*. The *Buse*, court stated: "Plaintiff [Buse]...will be denied an opportunity to present his claim in any court on any theory. Vanguard makes no secret of the fact that it will assert preclusion in Buse's Indiana case..." Also, it was inappropriate for the court of appeals to consider issue preclusion raised for the first time by Respondents in their opposition to the appeal. See *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The initial analysis should be made in the district court.

The court of appeals overlooked the Respondents' procedural maneuvers to thwart Pennsylvania and federal laws, and precluded Petitioner's case not on legitimate issue preclusion grounds, but on Respondents' mere *assertion* of the doctrine. Petitioner has addressed the erroneous preclusion of this case in Section C, *infra*, of this Petition. Petitioner's action was dismissed without adjudication by any court. [11]

REASONS FOR GRANTING THE PETITION

A. Conflict With PATTERSON and GUIDRY — The Third Circuit's Opinion Introduces Ambiguity Into What Had Appeared To Be Settled Law

In *PATTERSON*, *supra*, this Court protected pension benefits from creditors' claims, holding that an anti-alienation provision in a pension plan is an enforceable restriction on transfer. *Id.* at 764-65. Writing for a

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[11] Petitioner timely filed a *Petition for Rehearing* accompanied by a Motion for Leave to File An Overlength Petition. Contrary to Internal Operating Procedure 10.5.1, a single panel member denied the Petition and the Motion on August 22, 2002, stating, "*Any response received, due August 26, 2002, will be forwarded upon receipt.*" (App., *infra*, B12). The Order was received on Saturday, August 24, giving the widow **less than one business day to respond**. Petitioner timely filed a conforming Petition for Rehearing on Monday 26th. But contrary to the August 22 Order, the Petition was not forwarded to the panel upon receipt by the court. Instead, Petitioner was now advised to file a Motion for Leave to file the conforming Petition. Again Petitioner timely complied. Once again, the same panel member denied the widow's motion and issued mandate, stating "*Any response received, due September 23, 2002, will be forwarded upon receipt.*" However, that Order was not entered and mailed out by the court until October 2, 2002 - **after the deadline to respond had run**. At every step, Petitioner was denied any meaningful opportunity for rehearing.

unanimous court Justice Blackmun declared "[D]eclining to recognize any exceptions to that provision within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds." *Id.* at 764. This Court decreed that exclusions are determined by all bodies of law, State and federal, that make retirement assets untouchable by creditors: anti-alienation clauses in pension plans, and/or statutes that mandate inalienability of those assets. *Id.* at 758.

In so deciding, this Court first determined that the pension was held in a valid Trust. Second, that the Trust instrument had an anti-alienation provision. Third, that applicable non-bankruptcy law provided a means to enforce the transfer restriction. The third prong can be satisfied by federal or State law, (citing *Butner v. United States*, 440 U.S. 48 at 55 (1979), which states that creditors should have no different access to a debtor's property regardless of whether the debtor is, or is not in bankruptcy). This Court interpreted the law in accordance with its plain meaning, giving full effect to congressional policy to safeguard retirement assets– a legislative choice that the courts should leave to Congress and not judicially legislate exceptions thereto. *Id.* at 765.

Relying on its earlier decision in *Guidry v. Sheet Metal Workers Pension Plan*, 493 U.S. 365 (1990), this Court stated ERISA "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task." *PATTERSON* at 764.

In *GUIDRY*, *supra*, a labor union attempted to satisfy a judgment against Guidry's pension benefits because Guidry embezzled union funds. Although Guidry had

engaged in criminal misconduct, this Court prevented the seizure of Guidry's pension stating, it is "inappropriate to approve any generalized equitable exception to ERISA's anti-alienation provision. The identification of exceptions to the statutory bar is a task for Congress, not the courts.... Nor do we think it appropriate to approve any generalized equitable exception, either for employee malfeasance or for criminal misconduct, to ERISA's prohibition on the assignment or alienation of pension benefits." *Id.* at 376-377.

This Court further cautioned pension laws should not be supplemented by extra-textual remedies, such as common-law doctrines, that an anti-garnishment provision acts, by definition, to hinder the collection of a lawful debt, and that it makes little sense to adopt such provisions and then to refuse enforcement. *GUIDRY* at 376.

Among other cases which have followed *PATTERSON*, *In re Baker*, 195 B.R. 386 (Bankr. N.D. Ill. 1996), found that the creditor had failed to prove allegations of impropriety, and held the retirement assets to be protected from creditors' claims.

By contrast, the Third Circuit in the instant case broke new legal ground in elevating the Massachusetts court's conclusion and deviating from this Court's controlling decisions in *PATTERSON* and *GUIDRY*. Since *GUIDRY* involved the most severe type of misconduct, i.e., criminal conduct, it would appear that all lesser forms of wrongdoing should not result in the forfeiture or other alienation of the wrongdoer's interest in the retirement plan.

Petitioner denies any type of general fraud, and in particular any fraud relating to the IRAs. Apart from this, and the fact that no allegation of any specific misconduct **regarding the IRAs** was alleged, let alone proved, by anyone at any time to have been committed by Petitioner, any allegations of general fraud and/or such evidence would be

irrelevant and/or immaterial in light of *GUIDRY* and *PATTERSON*.

B. The Third Circuit's Opinion Creates A Conflict Among The Circuits As To The Law Protecting IRAs

The Third Circuit's decision in this case creates a conflict among the circuits, six of which have followed *PATTERSON* in protecting IRAs from creditors' claims.

The Second, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits' decisions have interpreted *PATTERSON* to extend its protection against creditors' claims to IRAs. See e.g., *In re Brucher*, 243 F.3d 242 (6th Cir. 2001); *In re McKown*, 203 F.3d 1188 (9th Cir. 2000) ("Congress regarded an IRA to be in the same general category as other retirement plans"); *In re Goldenberg*, 218 F.3d 1264 (11th Cir. 2000) (a physician's IRAs were held exempt from creditors' claims to satisfy a malpractice judgment against the doctor); *In re Meehan*, 102 F.3d 1209 (11th Cir. 1997); *In re Rawlinson*, 209 B.R. 501 (9th Cir. 1997); *In re Dubroff*, 119 F.3d 75 (2d Cir. 1997) (an IRA is a "plan or contract" materially similar to pension and profit sharing plans to provide for retirement); *In re Solomon*, 67 F.3d 1128 (4th Cir. 1995); and *In re Carmichael*, 100 F.3d 375 (5th Cir. 1996) (exempting IRAs is consistent with "the very policy furthered by exemptions--protecting a debtor's future income stream.")

In *Carmichael*, the Fifth Circuit analogized IRAs to Congress' treatment of other retirement plans stating "we find it more than plausible to infer that Congress intended for IRAs to be treated similarly for purposes of exemption. Indeed, to hold otherwise would be to create a trap for the unwary in those frequent instances in which funds from other exempt plans are 'rolled over' into IRAs when those other plans terminate or when employment ceases." *Id.*

In the case at bar, the Third Circuit upheld dismissal of Petitioner's action for damages/declaratory relief without reaching the merits of his claim that the IRAs in question were protected from a creditor's reach. [12] Petitioner's IRAs satisfied the *PATTERSON* test. Petitioner documented that his IRAs complied with 26 U.S.C. 408 in every respect, were held in valid Trusts containing anti-alienation provisions, and qualified for exclusion under State exemption statutes.

The court of appeals likewise failed to examine Vanguard and Founders' conduct in administering the IRAs. 26 U.S.C. 408 and the IRA Trust Agreements govern the Trustees' conduct. Vanguard and Founders' own IRA Trust Agreements contained anti-alienation clauses providing that the accountholder's interest shall be nonforfeitable, not subject to attachment, or execution to satisfy a judgment. Nothing in *PATTERSON*, the federal and State statutes or the IRA Agreements permits seizure of IRAs based on *ex-parte* undomesticated out-of-state court orders lacking jurisdiction over the IRAs and the Trustees.

Moreover, neither Vanguard nor Founders made any attempt to obtain judicial review from a court of appropriate jurisdiction over the IRAs as to the out-of-state Receiver's efforts to seize the IRAs. In *In re Wilcox*, 233 F.3d 899, (6th Cir. 2000) cert. denied, 233 F.3d 899, 905-906 (2001), the court held an anti-alienation provision is mandatory upon the plan administrator who might have sought judicial review of any attempt to reach retirement assets in contravention of the terms of the plan.

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[12] *PATTERSON* reiterated that the mere happenstance of bankruptcy should not reap a windfall for some to the detriment of others, (citing *Butner, supra,* at 55). In the instant case, the Receiver's claim is similar to a Trustee's claim in bankruptcy, and the fact that a judgment exists against Petitioner should not reap a windfall for the creditor to the detriment of the surviving spouse.

In short, the undomesticated Massachusetts order which Vanguard and Founders purported to rely upon, and the out-of-state Receiver, upon whose requests the Trustees acted, should have been found irrelevant in the instant action. Abuses of this type are among the evils Congress had in mind when it enacted 26 U.S.C. 408. Indeed, in *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997), the Third Circuit itself noted that an ERISA plan participant's individual suit against a breaching fiduciary for equitable relief (restitution) was appropriate as described by this Court in *Varity v. Howe*, 516 U.S. 489 (1996), because, like *Varity*, *Ream* had no alternative means of recovering his losses. See also *In re Bennett*, 185 B.R. 4 (Bankr. E.D.N.Y. 1995) which declared that Trustees are bound by law to obey the language of their plans, and the prohibition on the assignment or alienation of pension benefits must be followed without exception to that "broad statutory bar." *Id.* at 7 (quoting *PATTERSON* at 760).

Thus, Certiorari is appropriate to resolve the conflict among the circuits resulting from the lower court's decision.

C. The Third Circuit's Decision Introduces A Conflict Between The Supremacy Clause And The Full Faith & Credit Statute, And It Departs From The Accepted And Usual Course Of Judicial Proceedings In Federal Courts

1. The potential conflict between the Supremacy Clause of the Constitution and the full faith and credit statute, 28 U.S.C. § 1738, was recognized in *Midgett v. U.S.*, 603 F.2d 835, 845-46 (Ct. Cl. 1979), which held:

> "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. 50 C.J.S. Judgments § 900a (1947), at 519. Administrative bodies of the United States as well as courts are required to adhere to this

> requirement. *Torres v. Gardner*, 270 F.Supp. 1 (D.P.R.1967). Of course, this rule is limited by the Supremacy Clause. A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court. See *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1957) (State rule yields to federal policy favoring jury decisions of disputed fact questions in workmen's compensation cases); *Red Fox v. Red Fox*, 564 F.2d 361, 365 n. 3 (9th Cir. 1977) (federal policy of providing special status and protection to the Indians); *American Mannex Co. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040 (1972). We will discuss both the effect the decree would have in the Commonwealth of Virginia and, finally, whether use of the decree in an administrative body like the ABCMR would encroach enough on an important federal policy to warrant the ABCMR's ignoring the judicial decree.
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> Normally, against strangers to a proceeding a judgment is not even evidence to prove facts involved in the judgment. However, in proceedings in rem, although orders and decrees of a court do not have conclusive binding force upon all the world, they are prima facie evidence of the findings made therein. 8B Michie's Jurisprudence of Virginia & West Virginia, Former Adjudication or Res Judicata § 16, 68 (1977). See *Holly River Coal Co. v. Howell*, 36 W.Va. 489, 15 S.E. 214 (1892)." 603 F.2d at 845-46, (emphasis added).

The Third Circuit's decision to give preclusive effect to the Massachusetts orders/judgment not only denied Petitioner the opportunity to litigate the protected status of his IRAs, but effectively circumvented the Supremacy Clause's

injunction which makes 26 U.S.C. 408, *PATTERSON* and its progeny the supreme law of the land. [13]

The Third Circuit assumed, or accepted the unsupported assumption, that the IRAs were established by conduct prohibited by a Massachusetts injunction–but in doing so, it ignored the actual language of the injunctive order in question. App., *infra*, E26-E28. Neither the Third Circuit, nor the district court, nor the Massachusetts State court required the Receiver to support his allegations that the rollovers were efforts to shield money from a creditor. 26 U.S.C. 408 permits rollovers, and nothing in its language could be construed as suggesting that rollovers amount to improper transfers, or as supporting an inference, (let alone a presumption), that a rollover is evidence of an attempt to place funds beyond a creditor's reach. Moreover, had Petitioner's IRAs not been rolled over, those assets would have been exempt from attachment and execution in Massachusetts, which provided equal or greater protection than afforded in the States where the IRAs were located after

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[13] 26 U.S.C. 408 mandates that the IRA Trust be maintained for the **exclusive** benefit of an individual or his beneficiaries, and that an individual's interest in his IRA is **nonforfeitable** (emphasis added). Yet, the Third Circuit relied upon the Massachusetts court's baseless conclusion that Petitioner forfeited the right to his protected IRAs by allegedly violating an injunctive order prohibiting transfer of assets. App., *infra*, A-4, A-6, A-10, A-11. Petitioner denied that he violated any court order, and even if he had, there is no authority to support the conclusion that he thereby forfeited his right to the protected status of his IRAs. It is hornbook law that courts may not take notice of factual findings from other proceedings for the truth of the matters asserted. *General Electric Capital Corporation v. Lease Resolution Corporation*, F.3d 1074 (7th Cir. 1997). See also, *Holloway v. A.L. Lockhart*, 813 F.2d 874, 878-79 (8th Cir. 1987), (were it permissible for a court to take notice of a fact merely because it was found to be true in some other action, the doctrine of issue preclusion would be superfluous.)

the rollovers. There is not the slightest evidence that Petitioner sought to gain any advantage by the rollovers.

Thus, the proper interpretation of 28 U.S.C. § 1738 in cases involving out-of-state orders and judgments, purporting to allow creditors to seize IRAs, is an important federal question which this Court ought to resolve.

2. The Third Circuit's decision also departs from the usual course of judicial proceedings in federal courts. The specific modes described below are but examples of devices used to Petitioner's detriment in the instant case. The reason why, in the aggregate, these departures from accepted rules for litigation and adjudication justify a grant of certiorari, is that they illustrate the potential for evasion of the principles announced in *PATTERSON*. What follows needs to be understood as illustrative of the risks posed by the modes of proceedings sanctioned by the Third Circuit's decision.

a. Issue preclusion. Issue preclusion forecloses relitigation of matters which have been actually litigated and decided. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77, n. 1 (1984) (emphasis added). In addition, a federal court may not accord greater preclusive effect to a State court judgment than would the judgment-rendering State courts. *Id.* Thus, the analytic starting point requires a determination of (1) whether the instant issues have been actually litigated and decided, and (2) what effect the prior judgment has in the courts of the issuing State. *Matsushita Electric. Indus. Co. v. Epstein*, 516 U.S. 367, 386 (1996).

The Third Circuit expressly recognized that the Massachusetts court had ***"no occasion to consider which of the various statutory exemptions . . . would apply, and what proportions of the assets would be exempt."*** App., *infra*, A-6. Plainly, a determination as to the IRAs' nonforfeitable and exempt status under 26 U.S.C. 408 and Pennsylvania's and Missouri's statutes was and is the issue central to a

proper disposition of this case. Petitioner presented undisputed evidence as to the validity and exempt status of the IRAs. Nonetheless, Massachusetts and Pennsylvania courts denied him a full and fair opportunity to litigate that central issue, and even found it unnecessary to resolve that issue. [14] Issue preclusion as invoked by the court of appeals clearly risks the denial of significant due process protections.

In addition, before upholding dismissal, the Third Circuit should have applied Massachusetts preclusion jurisprudence, but it failed to do so. Massachusetts laws do not support precluding the instant action. See e.g. *Treglia v. MacDonald*, 430 Mass. 237 (1999), (the guiding principle is whether the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the first action or whether other circumstances justify relitigating the issue. *Id.* (citing *Martin v. Ring*, 401 Mass. 59, 61, 62 (1987), and quoting Restatement (Second) of Judgments § 27 comment e, at 256, and § 29 (1982)). "We reaffirm that preclusive effect should not be given to issues or claims that were not actually litigated in a prior action." *Id.* The inquiry ends if the issuing State would not give the prior judgment

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[14] Petitioner is entitled to, *inter alia*, a declaratory judgment on whether his IRAs complied with the Internal Revenue Code, and exemption statutes, (Count III, para. 47); a declaratory judgment on whether the receivership order was void and unenforceable (Count VIII, para. 66); and an opportunity to litigate the issue of IRA Trustees' misconduct (Counts IV, V, VI). (Amended Verified Complaint, C.A. 95-5235 (E.D. Pa.). The fact that the Massachusetts court ordered the turnover of the IRAs to the Receiver does not abolish Petitioner's claim that the IRAs are valid retirement assets, protected from creditors. No court has ever ruled that the IRAs were fraudulently established, or that the management of the IRAs through rollovers represented fraudulent conveyance. At a minimum, Petitioner is entitled to a factual finding and to have the issue of the validity of his IRAs actually litigated and decided. See e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

preclusive effect. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, at 383, 386 (1985).

By invoking issue preclusion, the Third Circuit avoided consideration of all of the federal and State issues in Petitioner's Complaint as described on page 10, *supra*. These issues were not part of the Receiver's *collection* action. [15] A prior judgment is not conclusive as to questions not actually litigated. *Cromwell v. County of Sac.*, 94 U.S. 351, 353 (1876). See e.g., *Pension Trust Fd. For Operating Engineers v. Triple A Mach. Shop*, 942 F.2d 1457 (9th Cir. 1991), (a judgment in an earlier State action did not preclude a later ERISA action).

b. Jurisdiction in rem. Because IRAs are mostly invested in mutual funds in various States, the question of jurisdiction over these assets is also of national concern. In Petitioner's case, the Massachusetts court did not, and could not have jurisdiction over Pennsylvania and Missouri IRA *res*. State court judgments are binding only if the State court had power to enter them. *Matsushita Electric. Indus., supra.* A court must have jurisdiction over the *res* of a dispute, and cannot exercise power beyond its boundaries. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Similarly, an out-of-state Receiver has no official title or authority in another jurisdiction. *Booth v. Clark*, 17 How. 322, 338 (1855). A Receiver's authority to act and take control of property is confined to the State which appointed him. 1 Clark, *Receivers* (3d ed. 1959), § 317 (f), p.539.

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[15] The issues, theory, facts, and standard of proof in Petitioner's *in rem* damages action are not identical to the Receiver's *in personam* action which was limited to asset collection. Factual findings and legal conclusions of all the different issues in Petitioner's action are necessary. Issue preclusion does not apply when one proceeding is larger, more detailed, and involves complex claims, or a different amount in controversy. Restatement (Second) of Judgments, § 28. Petitioner's action is just such an action and should not have been precluded because summary judgment entered in the Receiver's action.

The IRA Trusts provided that Pennsylvania laws had jurisdiction over the IRAs managed by Vanguard, while Missouri laws governed the Founders' IRAs. Petitioner's IRA assets and shares of mutual funds were physically located in Pennsylvania and Missouri. Shares of stock are governed by the same jurisdictional rules as other property. 1 Clark, *supra*, § 259, p. 385, Wright & Miller, *Federal Practice and Procedure*, § 1071, p. 430.

The principle of granting full faith and credit to an out-of-state judgment does not apply if the judgment-issuing court lacked jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877). A court order lacking jurisdictional basis is void and unenforceable. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (1988). Insofar as the Massachusetts court ordered the Receiver to seize the IRAs, and Vanguard and Founders to turn them over, such orders were without authority, void *ab initio*, and not entitled to full faith and credit. See e.g., *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482-83 (1982). A Massachusetts decree cannot command obedience elsewhere on a matter the Massachusetts court lacks authority to resolve. See e.g., *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 282-283 (1980) (plurality opinion) ("Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.") The Massachusetts orders/judgment did not reach beyond the receivership controversy to control proceedings elsewhere, and thus, Petitioner's action should be heard on the merits.

c. Enforcement of an out-of-state order/judgment. The question of the enforceability of an out-of-state order or judgment is likewise of significant national concern regarding IRA assets invested in different jurisdictions. The Massachusetts receivership orders/judgment were never domesticated in Pennsylvania and Missouri where the

Receiver sought to enforce them, and are unrecognizable there. It has long been established that "the judgment of a state Court cannot be enforced out of the state by an execution issued within it." *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325 (1839). Enforcement of judgment measures does not travel with the judgment; such measures remain subject to the control of forum law. *Id.* No execution can issue upon such judgments without a new suit in the other States. *Thompson v. Whitman*, 18 Wall. 457, 462-463 (1873).

Just as one State's judgment cannot automatically transfer title to land in another State, see *Fall v. Eastin*, 215 U.S. 1 (1909), similarly the undomesticated Massachusetts orders/judgment cannot transfer shares of mutual funds or IRA assets in another jurisdiction which were not subject to Massachusetts jurisdiction. Orders have been denied enforcement in a sister State when they purport to accomplish an act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. The Massachusetts order/judgment "does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *Lynde v. Lynde*, 181 U.S. 183, 187 (1901) (quoting *McElmoyle*, supra, 13 Pet. at 325). See e.g., *Watts v. Waddle*, 6 Pet. 389, 392 (1832). The Massachusetts judgment cannot reach beyond the receivership collection action to control a damages proceeding in another State which asserts issues the merits of which Massachusetts has not considered. Its undomesticated orders/judgment provide no basis for precluding Petitioner's action. Certiorari is warranted to ensure that uniform principles govern out-of-state orders/judgments as IRAs are mostly invested in mutual funds held by Trustees in different jurisdictions.

d. In personam jurisdiction over the Massachusetts Receiver. The court of appeals' decision upholding dismissal for lack of personal jurisdiction over the Receiver conflicts with several of this Court's precedents. App., *infra*, A3-A11. Petitioner's *declaratory* action 95-6637 (E.D. Pa.), was dismissed without prejudice for lack of personal jurisdiction over the Receiver. The court of appeals erroneously relied on that dismissal to preclude Petitioner from litigating in the instant action the issue of personal jurisdiction over the Receiver. This Court noted in *Semtek International Inc. v. Lockheed Martin Corporation*, 531 U.S. 497 (2001), that a dismissal without prejudice has no preclusive effect:

> ". . . The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim." *Id.*

Petitioner's declaratory action 95-6637 (E.D. Pa.) as well as Petitioner's instant action for damages 95-5235 (E.D. Pa.) were in the same federal district court.

The court of appeals also erred in precluding this action because Petitioner established that the Receiver had continuous and systematic contacts with Pennsylvania sufficient to exercise personal jurisdiction over him. The seizure of the IRAs occurred when, for over three years, the Receiver directed mail, telephone calls, and faxes to Vanguard in Pennsylvania. A single telephone call into the forum may support jurisdiction and satisfy due process requirements. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985). The Receiver even physically appeared in Pennsylvania in 95-6637 (E.D. Pa.), and yet the court declared it lacked personal jurisdiction over the Receiver. The Receiver's knowledge that Vanguard and Petitioner are Pennsylvania residents, that Vanguard performed its duties under a Pennsylvania Agreement, and that interference with the IRA Trust Agreement would affect Pennsylvania

statutes, and cause harm to Pennsylvania's property and residents are such that the Receiver should have "reasonably anticipate[d] being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

CONCLUSION

The Third Circuit's decision in the instant case encourages violations of the Internal Revenue Code and State exemption statutes, and fosters abuses in debt collection through strategic manipulation of the law. Under its reasoning, IRAs are ready targets for overreaching debt collectors. As here, a creditor could seize IRAs simply by *alleging* violation of a court order or fraudulent conveyance. Its decision also invites IRA Trustees to explore ways to evade their Trust Agreements. Any extraterritorial request to attach IRAs may be used as a subterfuge by Trustees to justify depriving account holders of their exempt property at the behest of an out-of-state stranger. A subsequent order could then be obtained on the specious theory that the out-of-state court ordered the turnover of the IRA. Few IRA account holders have the resources to litigate against large corporations. The Third Circuit's decision gives an unfair advantage to those who can strategically manipulate the law to seize protected retirement assets.

For the above-stated reasons, this Honorable Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

Shantee Maharaj

Shantee Maharaj, Executrix
The Estate of D. Dev Monga, Pro Se
426 Drummers Lane
Wayne, PA 19087
(610) 971-0185

January 19, 2003

APPENDIX A

The Judgment and Opinion of
The Third Circuit Court of Appeals,
Dated July 30, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No.: 01-1827

D. DEV MONGA

v.

JOHN C. OTTENBERG, Individually and as Receiver; BERRY, OTTENBERG & DUNKLESS; THE VANGUARD GROUP, INC.; VANGUARD FIDUCIARY TRUST COMPANY; VANGUARD/MORGAN GROWTH FUND, INC.; PAUL F. SOMMER; PETER S. BROOKS; BROOKS AND LUPAN; FOUNDERS FUNDS, INC.; INVESTORS FIDUCIARY TRUST COMPANY

The Estate of D. Dev Monga, by its Executrix, Shantee Maharaj ("Maharaj"),
Appellant

*(Pursuant to Rule 12(a), F.R.A.P.)

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-cv-5235)
District Judge: Honorable Herbert J. Hutton

Submitted Under Third Circuit LAR 34.1(a)
April 12, 2002

Before: ALITO, ROTH AND FUENTES,
CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on March 2, 2001, be and the same is hereby affirmed.

Costs are taxed against appellant. All of the above in accordance with the Opinion of the Court.

Attest:

"s/Bradford A. Baldus"
Bradford A. Baldus
Acting Clerk

DATED: July 30, 2002

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO: 01-1827

D. DEV MONGA

v.

JOHN C. OTTENBERG, Individually and as Receiver; BERRY, OTTENBERG & DUNKLESS; THE VANGUARD GROUP, INC.; VANGUARD FIDUCIARY TRUST COMPANY; VANGUARD/MORGAN GROWTH FUND, INC.; PAUL F. SOMMER; PETER S. BROOKS; BROOKS AND LUPAN; FOUNDERS FUNDS, INC.; INVESTORS FIDUCIARY TRUST COMPANY

The Estate of D. Dev Monga, by its Executrix, Shantee Maharaj ("Maharaj")
Appellant
*(Pursuant to Rule 12(a), F.R.A.P.)

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-cv-5235)
District Judge: Honorable Herbert J. Hutton

Submitted Under Third Circuit LAR 34.1(a)
April 12, 2002

Before: ALITO, ROTH AND FUENTES,
CIRCUIT JUDGES
(Filed July 30, 2002)

OPINION

PER CURIAM

The Estate of D. Dev Monga ("Monga"), by its Executrix, Shantee Maharaj ("Maharaj"), appeals the dismissal of a complaint filed by Monga against John C. Ottenberg; Berry, Ottenberg & Dunkless; The Vanguard Group, Inc.; Vanguard Fiduciary Trust Company; Vanguard/Morgan Growth Fund, Inc.; Investors Fiduciary Trust Company; and Founders Funds, Inc. Because this is an appeal from the district court's dismissal of Monga's complaint, we exercise plenary review. See Moore v. Tartler, 986 F.2d 682, 685 (3d Cir. 1993).

The circumstances surrounding this appeal began with a 1991 Massachusetts Superior Court ("Massachusetts court") judgment in the amount of $478,904 against Monga and two corporations which he controlled. Following the entry of judgment, the Massachusetts court entered injunctive orders prohibiting Monga from transferring his assets away from the jurisdiction. Despite the injunction, Monga mingled and concealed assets, and fraudulently conveyed both real and personal property to one or more third parties in an attempt to frustrate satisfaction of the judgment.

In June 1992, the Massachusetts court appointed John Ottenberg ("Ottenberg"), an attorney practicing law in Massachusetts, as Receiver to marshal Monga's assets. Ottenberg was ordered to collect all of Monga's assets, including two Individual Retirement Accounts ("IRAs"), of which Vanguard and Investors Fiduciary Trust Company ("the Funds") are the custodians. The Funds then froze Monga's IRAs. Thereafter, the Massachusetts court entered

another order, directing that all of Monga's assets, including the IRAs, be transferred to the Receiver. Monga, however, resisted the Massachusetts court's orders, claiming that neither he nor the Funds were subject to the jurisdiction of the Massachusetts court, and that in any event, the IRAs were exempt from attachment or execution.

In August 1995, while litigation over the IRAs continued in Massachusetts, Monga filed this pro se action in the District Court for the Eastern District of Pennsylvania. In this action, Monga seeks a declaratory judgment that the IRAs are exempt from creditors under federal and Pennsylvania law, as well as damages for various federal and state tort claims against Ottenberg; Berry, Ottenberg & Dunkless ("Dunkless"), a Massachusetts law firm; and the Funds.

Prior to the resolution of either the litigation in Massachusetts or the first Pennsylvania action, Monga filed an action in the Court of Common Pleas of Montgomery County, Pennsylvania, in September 1995, in which he again requested a declaratory judgment that the IRAs were exempt from creditors. The September 1995 action was eventually removed to the District Court of Eastern Pennsylvania ("second Pennsylvania action"). Meanwhile, in October 1995, the Massachusetts court issued an injunction prohibiting Monga and his counsel from pursuing Monga's claims in Pennsylvania any further.

In January 1996, the district court entered an order in the second Pennsylvania action dismissing Monga's complaint as to Ottenberg for lack of personal jurisdiction. Relying on the January 1996 order, the district court in this action dismissed all claims against Ottenberg, concluding that claim preclusion barred the exercise of personal jurisdiction over Ottenberg. In addition, the district court dismissed all claims against Dunkless, concluding that the

Massachusetts law firm lacked the requisite contacts with the Commonwealth of Pennsylvania to warrant the exercise of personal jurisdiction. All proceedings in this action were then stayed and the case was placed on the suspense docket after Monga was diagnosed with cancer. Monga died in August 1996. Since then, his widow and the executrix of his estate, Maharaj, has pursued the litigation in Massachusetts and Pennsylvania.

On August 1, 2000, the Massachusetts court entered a Judgment on the Receivership, distributing the receivership among Monga's creditors and discharging Ottenberg as Receiver. In the judgment, the Massachusetts court specifically addressed the IRAs at issue here, providing that the accounts were "to be turned over, forthwith, to the receiver, for distribution to creditors, subject only to the funds' claims for attorneys fees and litigation costs." The Massachusetts court determined that "Monga's continued defiance of this Court's orders, right until the time of his death, stripped him of all right to assert claims of statutory exemption for these accounts." Because Maharaj's claim to the assets derived solely from Monga's, the court concluded that she had no present interest in the accounts. Thus the court had "no occasion to consider which of the various statutory exemptions...would apply, and what proportion of the assets would be exempt."

Thereafter, more than five years after this action was placed on the suspense docket, the Funds filed a motion to dismiss in the district court. [1] The district court granted the

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[1] In a June 2000 hearing before the Massachusetts court, Maharaj stated it was her understanding that the complaint in this action was voluntarily dismissed in 1998, and "that litigation in other jurisdiction [had been] barred" by the Massachusetts court. However, nothing in the district court record indicates that Maharaj sought a voluntary dismissal at any point in the proceedings.

motion in March 2001. Maharaj then filed this appeal from the June 1996 and March 2001 district court orders dismissing Monga's 1995 complaint. For the reasons that follow, we will affirm.

The District Court properly dismissed Monga's complaint as to Ottenberg based on the doctrine of issue preclusion. Issue preclusion bars re-litigation of an issue identical to that in a prior action. See Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993). "The prerequisites for the application of issue preclusion are satisfied when: (1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." Burlington N.R.R. Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1231-32 (3d Cir. 1995) (citations and quotations omitted). Issue preclusion applies with equal force to a prior determination by a court that it lacks personal jurisdiction over a party. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931) (adjudication of personal jurisdiction issue precludes subsequent re-litigation of same issue); see also Matosantos Commercial Corp. v. Applebee's Int'l. Inc., 245 F.3d 1203, 1209 (10th Cir. 2001).

Here, all four prerequisites for the application of issue preclusion are met. The issue of the exercise of personal jurisdiction over Ottenberg was specifically determined by the district court in the second Pennsylvania action, and the determination resulted in a final, valid judgment. [2] Monga was a party to the prior litigation and

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[2] Although Monga appealed that order to this Court, the appeal was dismissed on July 26, 1996 for failure to order a transcript. See C.A. No. 96-1480.

had a full and fair opportunity to litigate the issue of personal jurisdiction. Accordingly, Monga was barred by the doctrine of issue preclusion from arguing in this action that the district court had personal jurisdiction over Ottenberg.

The District Court properly dismissed Monga's complaint as to Dunkless for lack of personal jurisdiction. Pursuant to Fed. R. Civ. P. 4(e), a district court may assert personal jurisdiction "over non-resident defendants to the extent permissible under the law of the state where the district court sits." Pennzoil v. Colelli & Assocs. Inc., 149 F.3d 197, 200 (3d Cir. 1998). "Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. Sect. 522(b), authorizes Pennsylvania courts 'to exercise personal jurisdiction over nonresident defendants to the constitutional limits of the due process clause of the fourteenth amendment.'" Remick v. Manfredy, et al., 238 F.3d 248, 255 (3d. Cir. 2001) (quoting Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992)). The plaintiff bears the burden of establishing that a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Asahi Metal Indus. Co., Ltd. V. Superior Court of California, 480 U.S. 102, 109 (1987) (citations and quotations omitted).

Personal jurisdiction may be exercised under two distinct theories, general jurisdiction or specific jurisdiction. See Remick, 238 F.3d at 255. General jurisdiction requires a showing that a defendant had "continuous and systematic" contacts with the forum state, and exists even if a plaintiff's cause of action arises from the defendant's non-forum related activities. See Vetrotex CertainTeed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 151 n.3 (3d Cir. 1996) (citations omitted). Specific jurisdiction, on the other hand, exists only if a plaintiff's cause of action rises out of a defendant's forum-related activities, such that a defendant "'should reasonably anticipate being haled into court there.'" Id. (quoting World-Wide Volkswagen Corp. v. Woodson,

444 U.S. 286, 297 (1980). Monga's assertion of personal jurisdiction is based solely on the theory of specific jurisdiction. In his submission to the district court, Monga failed to make any distinction between Ottenberg and Dunkless for purposes of personal jurisdiction, and only offered evidence related to Ottenberg's actions in this matter.

As is clear from the protracted proceedings at issue here, the entire matter arose from the entry of a judgment against Monga in Massachusetts, and Monga's repeated attempts to frustrate satisfaction of the judgment. Although Monga asserted that Ottenberg attempted to seize funds (the IRAs) located in Pennsylvania, Monga failed to present any evidence that in his effort to do so, Ottenberg directed any activity at Pennsylvania. Ottenberg neither registered the Massachusetts judgment in Pennsylvania, nor did he obtain a writ of execution from a court in this jurisdiction. Instead, all matters related to Ottenberg's position as Receiver originated, and were conducted, in Massachusetts. Thus, the district court correctly concluded that Monga failed to establish that Dunkless had the necessary "minimum contacts" with Pennsylvania, such t hat the exercise of personal jurisdiction over the law firm would comport with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Finally, the declaratory judgment claim and the breach of contract, breach of the duty of good faith and fair dealing, and conversion claims brought against the Funds fail as a matter of law. On August 1, 2000, the Massachusetts court entered a Judgment on the Receivership, distributing the receivership estate among Monga's creditors and discharging Ottenberg as Receiver. In the judgment, the Massachusetts court concluded that neither Monga nor Maharaj had any interest in the IRAs, and that Ottenberg, as the Receiver, was entitled to the IRAs for the purpose of distributing the assets to creditors. It is well settled that

federal courts must give full faith and credit to the effect of a previously adjudicated state court judgment. See Migra v. Warren City Sch. Dist. Bd. Of Educ., 465 U.S. 75 (1984). Thus, all courts must treat a state court judgment with "the same respect that it would receive in the courts of the rendering state...and must accept the rules chosen by the State from which the judgment is taken" in determining the effect of the judgment. Matsushita Elec. Indust. Co v. Epstein, 516 U.S. 367, 373 (1966) (citations and quotations omitted); see also Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988). Accordingly, to determine the preclusive effect of a prior state ruling, a federal court must apply the preclusion rules of the adjudicating state. See Greenleaf v. Hopeman Bros., Inc., 174 F.3d 352, 356-57 (3d Cir. 1999).

Under Massachusetts law, issue preclusion is warranted when the following conditions are met: "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; ...(3) the issue in the prior adjudication is identical to the issue in the current adjudication"... and (4) "the issue decided in the prior adjudication [was] essential to the earlier judgment." Commissioner of the Dept. of Employment & Training v. Dugan, 697 N.E.2d 533, 536 (Mass. 1996). Here all four conditions are met. The issue of ownership of the IRAs was specifically determined by the Massachusetts court, and the determination resulted in a final, valid judgment. Monga was a party to the prior litigation and had a full and fair opportunity to litigate the issue of whether and to what extent the IRAs were subject to the claims of Monga's creditors. Maharaj is, therefore, barred by the doctrine of issue preclusion from arguing in this action that she has any right to the IRAs or that the IRAs are not subject to the claims of Monga's creditors.

Because the Massachusetts court concluded that neither Monga nor Maharaj had right to the IRAs, the Funds did not act improperly in freezing the assets. As such, the

declaratory judgment claim and the breach of contract, breach of the duty of good faith and fair dealing, and conversion claims brought by Monga against the Funds fail as a matter of law.

Accordingly, we will affirm for the reasons articulated herein and by the district court.

APPENDIX B

The Third Circuit Court of Appeals' Order
denying the *Petition For Rehearing By*
The Panel And Suggestion For Rehearing En Banc,
Dated August 22, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

August 13, 2002

No. 01-1827

Re: Monga v. Ottenberg

Present: ALITO, Circuit Judge

1. Motion by Appellant for Leave to File Overlength Petition for Rehearing.

2. Copy of Petition for Rehearing.

3. The Per Curiam Opinion in this appeal was filed July 30, 2002.

4. Any response received, due August 26, 2002, will be forwarded upon receipt.

"s/Nicole M. Bruno"
Nicole M. Bruno
Case Manager
Direct Dial 267-299-4924

ORDER

The foregoing is denied

By the Court,

"s/Samuel A. Alito, Jr."
Samuel A. Alito, Jr
Circuit Judge

Dated: August 22, 2002

APPENDIX C

Memorandum And Order of The United States District Court For The Eastern District Of Pennsylvania, Dated March 1, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

D. DEV MONGA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN C. OTTENBERG,	:	
et al.	:	NO. 95-5235
		FILED MAR 1-2001

MEMORANDUM AND ORDER

HUTTON, J. February 28, 2001

Presently before this Court are Motion of Vanguard and IFTC to Dismiss This Action with Prejudice (Docket No. 70), Motion of Founders Funds to Dismiss with Prejudice (Docket No. 72), Plaintiff's Corrected Memorandum in Opposition to Vanguard's, IFTC's and Founders Motions to Dismiss (Docket No. 87), Reply Brief of Vanguard and IFTC in Support of Their Motion to Dismiss this Action with Prejudice (Docket No. 88), Reply of Founders Funds, Inc. In Support of its Motion to Dismiss this Action with Prejudice (Docket No. 89) and Plaintiff's Opposition to New Material Inappropriately Submitted by Vanguard and IFTC in their Reply Brief, and Plaintiff's Response to Misstatements of Fact and Law (Docket No. 90). For the following reasons, Defendant's Motions are **GRANTED** and this action is **dismissed with prejudice.**

STANDARD OF REVIEW

When considering a motion to dismiss a complaint

ENTERED: 3/2/01
CLERK OF COURT

for failure to state a claim under Rule 12 (b) (6)[3], this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12 (b) (6) ... is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988)); *see also H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc.*, 492 U.S. at 249-50. Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. *See Morse v. Lower Marion Sch. Dist.*, 162 F.3d 902, 906 (3d Cir. 1997). The Federal Rules of Civil Procedure do not, however, require detailed pleading of the facts on which a claim is based. Instead, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." FED. R. CIV. P. 8 (a) (2) (West 2000).

DISCUSSION

This action was commenced by D. Dev Monga ("Monga") on November 25, 1995. It is the third action filed arising from the same dispute between Monga and a receiver appointed by the Massachusetts Superior Court, John C. Ottenberg ("Ottenberg"), concerning the collection by

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[3] Rule 12 (b) (6) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading...shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the opinion of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted...." Fed. R. Civ. P. 12 (b) (6).

Ottenberg of Monga's assets for distribution to judgment creditors and his now defunct corporation. *See* Massachusetts Superior Court Civil Action No. 89-2951. Among the assets in dispute are certain roll over Individual Retirement Accounts with Founders Funds, Inc., of which Vanguard and IFTC are the respective custodians. The action in the above captioned case, a second action also filed in the Eastern District of Pennsylvania (Civil Action No. 95-6637) and the Massachusetts Superior Court action all arose from the same factual background and raised essentially the same issues.

The Eastern District of Pennsylvania Action No. 95-6637 was dismissed on April 18, 1996 by the Honorable James T. Giles. In March of 1996, Monga was diagnosed with cancer. As a result of Monga's illness, all proceedings in the instant action were stayed and this case was placed in the Suspense Docket on June 13, 1996. Monga died on August 23, 1996. Since then, his widow and the executrix of his estate, Shantee Maharaj ("Maharaj") has pursued the Massachusetts litigation.

On August 1, 2000 the Massachusetts Superior Court entered its Judgment on the Receivership, distributing the receivership estate among Monga's creditors and discharging Ottenberg as Receiver. *See* Judgment on Receivership, entered August 1, 2000.

During a recent hearing before the Massachusetts Superior Court, Ms. Maharaj stated her understanding that the "complaint [in the Pennsylvania action] was ...voluntarily dismissed in 1998..." and that "litigation in other jurisdictions [had been] barred [by the Massachusetts Superior Court]...." *See* Transcript of excerpt from hearing held on June 22, 2000, at pp. 1-19, 1-21.

In addition, Ms. Maharaj has been "permanently enjoined" by the Massachusetts Superior Court "from instituting or prosecuting against Vanguard, IFTC, or any of them, any proceeding in any state of United States court or administrative tribunal regarding the Monga IRA accounts." *See* Memorandum of Decision and Orders on Pending Motions, October 8, 1998, at 19. Also, in that same Order of the Massachusetts Superior Court, Ms. Maharaj was "permanently enjoined from instituting or prosecuting against Founder Funds, Inc., any proceeding in any state or United States court or administrative tribunal regarding the Monga IRA accounts." *See id,* at 20.

Accepting all facts and all reasonable inferences in Plaintiff's Complaint as true, the Court holds that Plaintiff is not entitled to relief.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. DEV MONGA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN C. OTTENBERG, et al.	:	NO. 95-5235

ORDER

AND NOW, this 28th day of February, 2001, upon consideration of Motion of Vanguard and IFTC to Dismiss This Action with Prejudice (Docket No. 70), Motion of Founders Funds to Dismiss with Prejudice (Docket No. 72), Plaintiff's Corrected Memorandum in Opposition to Vanguard's, IFTC's and Founders Motions to Dismiss (Docket No. 87), Reply Brief of Vanguard and IFTC in Support of Their Motion to Dismiss this Action with Prejudice (Docket No. 88), Reply of Founders Funds, Inc. in Support of its Motion to Dismiss this Action with Prejudice (Docket No. 89) and Plaintiff's Opposition to New Material Inappropriately Submitted by Vanguard and IFTC in their Reply Brief, and Plaintiff's Response to Misstatements of Fact and Law (Docket No. 90) IT IS HEREBY ORDERED that Motions are **GRANTED** and this action is dismissed with prejudice.

BY THE COURT

"s/Herbert J. Hutton"
Herbert J. Hutton, J.

APPENDIX D

Memorandum And Order of The United States District Court For The Eastern District Of Pennsylvania, Dated June 13, 1996

FILED JUNE 13 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. DEV MONGA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN C. OTTENBERG,	:	
et al.	:	NO. 95-5235

MEMORANDUM AND ORDER

HUTTON, J. June 11, 1996

Presently before this Court is defendants John C. Ottenberg and Berry, Ottenberg & Dunkless' Motion to Dismiss Plaintiff's Complaint and the plaintiff's response thereto.

BACKGROUND

The facts of this case are intricately involved with several actions filed in Massachusetts State court and another action in this district (C.A. No. 95-6637). In 1989, defendant Paul Sommer ("Sommer"), a former business partner of the plaintiff, D. Dev Monga ("Monga"), sued Monga in Massachusetts State court for breach of contract and breach of fiduciary duty. A verdict was entered in favor of Sommer in the amount of $478,904.03 and the State court also entered injunctive orders that prohibited Monga from transferring his assets away from Massachusetts. Despite the Court's injunctive orders, Monga apparently did transfer his assets in an attempt to frustrate satisfaction of the judgment. Accordingly, the Massachusetts State court appointed the defendant, John Ottenberg ("Ottenberg"), as Receiver to collect Monga's assets.

ENTERED: 6/14/96

CLERK OF COURT

As court appointed Receiver, Ottenberg obtained an Order from the Massachusetts State Court that required the defendants Vanguard Fiduciary Trust Company and Investors Fiduciary Trust Company (collectively "the Funds") to turnover the assets in Monga's individual retirement accounts ("IRAs") to Ottenberg. The Funds, however, refused to comply with the court order after Monga had apparently threatened to sue the Funds if the assets were released. Ottenberg, therefore, initiated a separate lawsuit in Massachusetts State court to obtain Monga's assets from the Funds. This action is apparently still pending.

Subsequently, Monga filed two separate actions in Pennsylvania. The first action was brought in the Court of Common Pleas for Montgomery County, Pennsylvania against, inter alia, Ottenberg and the Funds. Monga requested a declaration that the monies in his IRA's were exempt from creditor claims brought by Ottenberg. This action was eventually removed to this Court and assigned to the Honorable James T. Giles. See Monga v. Ottenberg, C.A. No. 95-6637 (E.D. Pa.). On January 26, 1996, Judge Giles dismissed the first action brought by Monga for lack of personal jurisdiction over Ottenberg. Finally, on April 15, 1996, after conducting a hearing, Judge Giles denied Monga's motion for reconsideration. [4]

The second action brought by Monga - -i.e., the present case now before this Court — was filed on August 15, 1995 against various defendants that included, inter alia, Ottenberg, the Funds, and Ottenberg's law firm Berry, Ottenberg & Dunkless ("Dunkless"). In this action, Monga has requested declaratory relief as well as damages, and has

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[4] In his order denying the Motion to Reconsider, Judge Giles stated that "[t]the court, in accordance with its Order dated January 26, 1996, finds that Mr. Ottenberg has not made a purposeful incursion into Pennsylvania such that this court may exercise in personam jurisdiction over him."

raised several causes of action - - e.g. tortious interference with contract, abuse of process, breach of contract and conversion.

DISCUSSION

The Ottenberg and Dunkless Defendant now move this Court for an Order dismissing the plaintiff's complaint. In their motion, the defendants have raised the following issues: (1) personal jurisdiction over the defendants; (2) venue; and (3) failure to state a claim upon which relief can be granted. Based on the following reasons, this Court finds that it does not have personal jurisdiction over the Ottenberg and Dunkless Defendants and, and therefore, the plaintiff's claims against these defendants shall be dismissed.[5]

The Ottenberg Defendant

In Civil Action No. 95-6637, the Honorable James T. Giles recently determined that this Court lacked personal jurisdiction over Defendant Ottenberg. Accordingly, I conclude that Monga is now precluded, based upon Judge Giles' early ruling, from relitigating the issue of personal jurisdiction in this matter with respect to Defendant Ottenberg.

The doctrine of issue preclusion "derives from the simple principle that 'later courts should honor the first actual decision of a matter that has been actually litigated.' Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., 63 F. 3d 1227, 1231 (3d Cir. 1995) (quoting 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE Sect. 4416 (1981)). This doctrine ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is

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[5] Whereas this Court will grant the Defendants' motion due to lack of jurisdiction, I will not address the remaining issues raised by the Defendants.

conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Four requirements must be satisfied in order for the doctrine of issue preclusion to apply: (1) issue decided in the prior case must have been identical with the issue presented in the later matter; (2) the issue was actually litigated; (3) there was a final and valid judgment; and (4) the issue was essential to the prior judgment. Burlington Northern, 63 F.3d at 1231-32; see also In re Graham, 973 F. 2d 1089, 1097 (3d Cir.1992) (quoting In re Braen, 900 F.2d 621, 628-29 n. 5 (3d Cir.1979), cert. denied, 498 U.S. 1066 (1991)).

Based upon the facts of this case, it is clear that the doctrine of issue preclusion prevents relitigation of the question as to whether this Court has personal jurisdiction over Ottenberg.[6] First, with respect to the question of specific

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[6] Under Pennsylvania's long-arm stature and the due process clause of the Constitution, the determination of whether personal jurisdiction exists over a defendant is a two-step analysis. First, the court must determine whether it has "specific jurisdiction" by determining whether the cause of action arose from the defendant's forum related activities. Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 541 (3d Cir. 1985). If so, "defendant's conduct and connection with the forum State...[must be] such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 256 (1980). The defendant must have "purposely avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Furthermore, subjecting the defendant to jurisdiction in a Pennsylvania court can not offend traditional notions of fair play and substantial justice. Gehling, 773 F.2d at 541 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

Second, if the claim does not arise from defendant's forum related activities, then the court must determine if it has "general jurisdiction" over the defendant. Under this type of jurisdiction, the plaintiff must show that the defendant has maintained

jurisdiction, the issue of whether the cause of action arose from Ottenberg's activities was a subject of Civil Action No. 96-6637. Second, Judge Giles reached the merits of the specific jurisdiction question.[7] Third, the Court's decision with respect to specific jurisdiction was a final and valid judgment.[8] Finally, the determination that the court lacked personal jurisdiction over Ottenberg was essential to Judge Giles' decision in Civil Action No. 95-6637.[9]

"continuous and systematic" contacts with the forum to satisfy the requirements of due process. Mellon Bank (East) PSFS v. Diveronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993).

[7] In his opinion, Judge Giles specifically stated:

> Although Monga asserts Ottenberg has attempted to seize funds located in the Commonwealth [of Pennsylvania], he has failed to present evidence to show that Ottenberg, in an effort to do so, directed any activity in Pennsylvania. Ottenberg has not registered the Massachusetts judgment here, nor has he obtained a writ of execution from a court in this jurisdiction. Instead, all matters relating to Ottenberg's attempt to enforce the Sommer's judgment have originated in, and have been conducted in Massachusetts.

Monga v. Ottenberg, C.A. No. 95-6637, slip op. at 6 (E.D. Pa. January 26, 1996).

[8] After conducting a hearing on a motion to vacate/reconsider the Order dated January 26, 1996 which was filed by Monga, the Court issued a subsequent order dated April 15, 1996/ In this second order, the Court reiterated its previous finding that it lacked personal jurisdiction over Ottenberg and denied Monga's motion.

[9] In fact, the court dismissed the entire action once it determined that Monga had not established the existence of in personam jurisdiction over Ottenberg.

With respect to the issue of general jurisdiction, a court must evaluate all of a defendant's contacts with the forum until the time of service of process. See Brennan v. Walt Disney Productions Inc., CA No. 84-5812, 1986 WL 9488, at *3 (E.D. Pa. Aug. 28, 1986); Cohen v. Rosengarten, 88 F.R.D. 568, 570-71 (E.D. Pa. 1980); Strick Corp. v. Cravens Homalloy Ltd., 352 F.Supp. 844, 846 (E.D. Pa. 1972). Thus the forum State may obtain jurisdiction over a defendant in a subsequent action if the defendant has established additional contacts after service in the first action but prior to service in the second.[10] Monga, however, has failed to produce any evidence of "continuous and systematic" contacts with Pennsylvania that took place between the two dates of service. Thus, the issue with respect general jurisdiction in this action is no different from that presented in the prior action and, therefore, the doctrine of issue preclusion does prevent this Court from considering whether Ottenberg is subject to general jurisdiction.[11]

The Dunkless Defendant

Upon reviewing the plaintiff's pleadings and response to the current motion, this Court finds that Monga has failed to present any separate/distinct evidence to establish either specific or general jurisdiction over the Dunkless Defendant. In fact, Monga has failed to make any distinction between the Ottenberg and Dunkless Defendants for purposes of personal jurisdiction. Accordingly, this Court also finds that the Dunkless Defendant has not made a

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10 In this case, Ottenberg was served with Monga's Amended Complaint on December 4, 1995. The date when Ottenberg was served in Civil Action No. 95-6637, however, is uncertain from the record. Nevertheless, the record in civil action 95-6637 is clear that Ottenberg filed his notice of removal on October 18, 1995.

11 This Court does find that the remaining three requirements under the doctrine of issue preclusion have been met with respect to the issue of general jurisdiction.

purposeful incursion into Pennsylvania such that this Court may exercise personal jurisdiction over the law firm.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. DEV MONGA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN C. OTTENBERG, et al.	:	NO. 95-5235

ORDER

AND NOW, this 11th day of June, 1996, upon consideration of Defendants John C. Ottenberg and Berry, Ottenberg & Dunkless' Motion to Dismiss Plaintiff's Complaint and the Plaintiff's response thereto, IT IS HEREBY ORDERED that the Defendants' Motion is GRANTED.

IT IS FURTHER ORDERED that the Plaintiff's claims against Defendants John C. Ottenberg and Berry, Ottenberg & Dunkless are DISMISSED.

BY THE COURT:

"s/Herbert J. Hutton"
Herbert J. Hutton, J.

APPENDIX E

Massachusetts' creditor Paul F. Sommer's
Motion For The Entry of Permanent Injunction,
Middlesex Superior Court, Massachusetts, C. A. 89-2851,
Dated June 12, 1991

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX. SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

PAUL F. SOMMER,
Plaintiff

v.

D. DEV MONGA, ET AL
Defendants

PLAINTIFF'S MOTION FOR THE ENTRY OF PERMANENT INJUNCTION

The plaintiff Paul F. Sommer ("Sommer") hereby moves for the entry of a permanent injunction against the defendants D. Dev Monga, Core Environmental & Engineering Resources, Inc., and Subsurface Technologies, Inc. restraining and enjoining each of the defendants from selling, assigning, transferring, encumbering or otherwise disposing of any of their real or personal property, other than in the ordinary and usual course of business, until the judgment in this matter has been satisfied or has been vacated.

As grounds for his motion, Sommer states:

1. On June 7, 1991, the jury returned a verdict in favor of Sommer in an amount totaling approximately $478,000.00. With pre-judgment

interest on the breach of fiduciary duty claim and the assessment of costs, the judgment to be entered pursuant to that jury verdict will be in the amount of approximately $550,000.00. Assuming an appeal of the judgment by the defendants and the continuing accrual of post-judgment interest, it is likely that the execution that will be ultimately issued by this Court will be in the amount of approximately $700,000.00 against all of the defendants.

2. There is a substantial risk that the defendants will hide, conceal or otherwise dispose of their assets to avoid satisfying the judgment entered in this action. The verdict of the jury confirms the animosity of the defendants toward the plaintiff and suggests that the defendants will avoid satisfying the judgments in this action at all costs.

3. The injunction will not unduly interfere with the personal or business activities of the defendants, as the injunction only would prohibit the bulk or unusual transfer of assets and would not interfere with the defendants' ability to continue in business.

For the foregoing reasons, Sommer requests that the Court enter a permanent injunction restraining the defendants from disposing of their assets other than in the normal course of business until the judgment has been satisfied or vacated.

By his attorneys,

"s/Peter S. Brooks"
Peter S. Brooks
B.B.O. #058980
Brooks & Brooks
20 North Main Street
Suite 200
Sherborn, MA 01770
(508) 653-9275

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by mail on

"s/ 6/12/91"

"s/ Peter S. Brooks"

Peter S. Brooks

APPENDIX F

Ex-Parte Order obtained by Massachusetts' creditor Paul F. Sommer for Appointment of Receiver, (which included the *ex-parte* receivership over a **non-party individual**), from Middlesex Superior Court, Massachusetts, C. A. 89-2851, Dated June 15, 1992

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX. SS.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT CIVIL ACTION NO. 89-2951

PAUL F. SOMMER,
Plaintiff

v.

D. DEV MONGA, ET AL
Defendants

ORDER FOR APPOINTMENT OF RECEIVER

This action was heard upon the return of an order to show cause why a receiver should not be appointed to take possession of the property of the defendants, D. Dev Monga ("Monga"), Core Environmental Resources, Inc. (formerly Core environmental & Engineering Resources, Inc.) ("Core"), and Subsurface Technologies, Inc. ("Subsurface") (collectively, the "Defendants") and of Monga's wife, Shantee Maharaj Monga ("Maharaj"). After hearing, the Court finds as follows:

1) Sommer has obtained judgments in this Court totalling, with pre-judgment interest,

approximately $550,000.00 against Core, Subsurface and Monga;

2) Core, Subsurface and Monga have assets that are applicable to payment of Sommer's judgment, but Monga has mingled the assets of Core and Subsurface with his own and those of his wife, Maharaj, and has concealed the assets of all four;

3) present circumstances are such that to deny this motion would lead to the wasting and loss of such property owned by Monga, Core and Subsurface;

4) Sommer's judgments against Monga cannot be satisfied because Monga has fraudulently conveyed his real and personal property to one or more third parties; and

5) Sommer has no adequate remedy at law to preserve the property subject to his judgments.

It is therefore, ORDERED AND ADJUDGED that, until further order of the Court:

1. John Ottenberg, Esquire, 260 Franklin Street, Boston, MA 02110 be and hereby is appointed receiver of the estate, property, money, debts, and effects of every kind and nature of or belonging to the defendants and to Maharaj and he is hereby authorized and directed to collect, get in, and take charge of all the singular thereof, and to hold the same subject to the further order of the Court.

2. That the defendants, and Maharaj, their officers, servants, agents and attorneys and each of them, are hereby required and ordered to deliver to said receiver all the property, monies, stock in trade

and effects of every kind and nature, belonging to the defendants in their hands, possession, or control, together with all books, deeds, documents, vouchers, and papers relating thereto, and the defendants and Maharaj, and their officers, servants, agents and attorneys, and each of them, are hereby restrained and enjoined from collecting any of the debts or accounts due to the defendants, and from using, spending, injuring, conveying, transferring, selling, or in any manner disposing of or encumbering any of the effects or property aforesaid, except to deliver them into the hands of said receiver.

3. That the receiver is hereby ordered to collect all sums due the defendants, for the benefit of the parties entitled thereto and to conserve and manage the assets of the defendants, and all of Core's and Subsurface's subsidiaries and to operate the defendants' respective businesses and to provide to the Court an accounting as required by Rule 66 of the Massachusetts Rules of Civil Procedure and the applicable provisions of the Massachusetts General Laws including, without limitation, Chapter 155 and Chapter 156B.

4. That the said receiver is required to file in the office of the clerk of this Court, within thirty days after the date of entry of this Order, under oath, a detailed inventory of the property of which he has possession, or the right of possession, with the estimated values thereof, together with a list of encumbrances thereon; and also a list of the creditors of the receivership and of the defendants and Maharaj so far as known to them.

5. That the receiver shall deposit all money received by him in some national bank, trust company, co-operative bank or savings bank in his

name as receiver, but no disbursements of these funds shall be made by the receiver without further order of the Court.

6. That all persons claiming to be creditors of the defendants or Maharaj, or any of their successors, assigns or subsidiaries, are hereby enjoined from instituting any suits, from further prosecuting any suits heretofore instituted, or exercising any power of foreclosure against any of the defendants or Maharaj without special permission from this Court.

7. That the defendants and Maharaj, their officers, servants, agents and attorneys, and the receiver, shall make available for inspection and review by Sommer and/or his agents all of the defendants' and Maharaj's books and records.

8. That any of the parties or Maharaj, or the said receiver, may apply to the Court from time to time for such further directions, or orders, as many as may be necessary.

9. The fact that this Order is issued pursuant to Sommer's prayer shall not be deemed to alter the pre-existing legal relationship between Sommer and the defendants or to dissolve any attachments or injunctions entered or to be entered by this Court or by the Court presiding in Sommer v. Monga, et als., Middlesex Superior court Civil Action No. 91-7415 against any of the defendants in this case.

10. The receiver shall also be entitled to collect all mail of any of the defendants and Maharaj in Marblehead, Salem and Peabody, Massachusetts, or in any other location in which any of the defendants or Maharaj maintain postal service.

11. The receiver, his agents, and attorneys shall not be personally liable for any actions or inaction arising out of the discharge or performance of the receiver's duties and powers. Any judgment recovered against the receiver, as such, or against the defendants or Maharaj shall be payable only from the defendants' funds.

12. The receiver may apply to the Court for instructions, and the Court reserves the right to make and enter such further orders, upon appropriate application, as may be necessary or desirable for the administration of the estates.

13. Receiver is to post a bond in the sum of $5,000:

SO ORDERED,

"s/ Katherine Liacos Izzo"
Katherine Liacos Izzo
Associate Justice

Dated: June 15, 1992

APPENDIX G

Ex-Parte Order obtained by the Massachusetts Receiver over non-party Vanguard Fiduciary Trust, Co. from Middlesex Superior Court, Massachusetts, C. A. 89-2851, Dated July 7, 1992

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX. SS. SUPERIOR COURT

DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

PAUL F. SOMMER,
Plaintiff

v.

D. DEV MONGA, ET AL
Defendants

ORDER

This action came to be heard before the Court, Izzo, J. presiding, on the motion of the plaintiff for an order clarifying this Court's previous order appointing a receiver and, upon consideration thereof,

IT IS HEREBY ORDERED AND ADJUDGED:

All funds of the defendants or Maharaj standing in a so-called "IRA" account including the account with Vanguard Fiduciary Trust, Co. shall be transferred to the receiver and held and administered in accordance with the previous order of this Court appointing the receiver.

"s/Katherine Liacos Izzo"
Katherine Liacos Izzo
Associate Justice

Dated: July 7, 1992

APPENDIX H

Ex-Parte Order obtained by the Massachusetts Receiver over non-party Citadel Service Co. Inc., Transfer Agent for Founders, from Middlesex Superior Court, Massachusetts, C. A. 89-2851, Dated August 20, 1992

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX. SS.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT CIVIL ACTION NO. 89-2951

PAUL F. SOMMER,
Plaintiff

v.

D. DEV MONGA, ET AL.
Defendants

ORDER

John C. Ottenberg having been appointed receiver of Dharam Dev Monga in this matter, and this matter having come before the Court on the Request for Instructions Regarding Founders Fund Accounts, it is hereby Ordered, Adjudged, and Decreed as follows:

1. The Citadel Service Co., Inc., transfer agent for Founders Funds is ordered to turn over to the receiver all of the funds held by it and the Founders Funds, standing in the name of Dharam Dev Monga, IRA.

2. The receiver is ordered to maintain said funds in an account, designated as an IRA account, and thereafter entitlement to these funds shall be determined in later proceedings in this case.

By the court,

"s/Doerfer, J"
Doerfer, J.

Dated: August 20, 1992

Attest " s/Leona M. Kusmirek"
Leona M. Kusmirek
Assistant Clerk

APPENDIX I

Order issued by Pennsylvania Court of Common Pleas, Montgomery County, C.A. 95-17717, requiring Vanguard and Founders' Trustee agent to place Petitioner's IRAs in *custodia legis* with said court,
Dated September 22, 1995

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY

D. DEV MONGA
24 N. Merion Avenue, #132
Bryn Mawr, PA 19010

ACTION FOR
DECLARATORY
JUDGMENT
NO. 95-17717

v.

JOHN C. OTTENBERG,
RECEIVER
260 Franklin Street
Boston, MA 02110

-and-

VANGUARD FIDUCIARY
TRUST COMPANY
455 Devon Park Drive
Wayne, PA 19087

-and-

INVESTORS FIDUCIARY
TRUST COMPANY
127 West 10th Street
Kansas City, MO 64015

ORDER ACCEPTING
PLAINTIFF'S VOLUNTARY TENDER OF
RETIREMENT FUNDS
IN *CUSTODIA LEGIS* PENDING FURTHER ORDER
OF COURT

And now, this 22nd day of September, 1995, plaintiff D. Dev Monga, also known as Dharam Dev Monga ("Monga"), having voluntarily tendered control and custody his retirement funds to the Court in custodia legis pending a determination of whether said funds are exempt from execution and attachment in satisfaction of an outstanding judgment in Massachusetts, it is hereby ORDERED and DECREED that, pending further Order of the Court:

1) The following Individual Retirement Account established and beneficially owned by Monga are hereby placed in custodia legis with the Court:

   a) Account No. 0026-09876070647 registered with Vanguard Fiduciary Trust Company ("Vanguard") as custodian for the benefit of Dharam Dev Monga;

   b) Account Nos. 375-1000434831 and 375-1000434832 registered with Investors Fiduciary Trust Co. ("IFTC") as custodian for the benefit of Dharam Dev Monga.

2) Vanguard and IFTC shall forthwith deliver certificates representing Monga's ownership interest in the above accounts to the Prothonotary of the Court:

3) Vanguard and IFTC are hereby discharged from any and all liability resulting from their compliance with this Order, and upon deliver of certificates to the Prothonotary,

are excused from further attendance in this case;

4) The claim by Defendant John C. Ottenberg, Receiver ("Ottenberg"), that Monga's retirement funds are subject to execution in satisfaction of the Massachusetts judgment is specifically preserved through the depositing of the above accounts in custodia legis and will be addressed as part of plaintiff's declaratory judgment action.

BY THE COURT:

"s/Paul W. Tressler, Judge"
Paul W. Tressler, Judge

CERTIFIED FROM THE RECORDS OF THE
PROTHONOTARY COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, PA
Dated 9/22/95
WILLIAM E. DONNELLY, PROTHONOTARY